

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM K. SOUTHWICK, JR. AND : CIVIL ACTION
JENNIFER SOUTHWICK :
 :
 v. :
 :
 :
 YALE MATERIALS HANDLING :
 CORPORATION AND INDUSTRIAL :
 TRUCKS, INC. : NO. 97-383

MEMORANDUM AND ORDER

BECHTLE, J.

JUNE 26, 1997

Presently before the court is William K. Southwick, Jr. and Jennifer Southwick's ("Plaintiffs") Motion to Remand and Yale Materials Handling Corporation ("Yale") and Industrial Trucks, Inc.'s ("Industrial") (collectively, "Defendants") opposition thereto. For the following reasons, the court will grant the motion.

I. BACKGROUND

On February 20, 1995, William K. Southwick, Jr., was injured while operating a motorized riding pallet truck manufactured by Yale and sold by Industrial. On December 17, 1996, Plaintiffs filed a Complaint against Defendants in the Court of Common Pleas of Philadelphia County alleging state-law negligence and strict liability claims. On the same day, two copies of the Complaint were served upon CT Corporation System, the registered Pennsylvania agent for both Yale and Industrial.

On January 16, 1997, NAACO, the corporate entity that trades and does business as Yale Materials, filed a Notice of Removal to this court pursuant to 28 U.S.C. § 1441, alleging that subject matter jurisdiction exists under 28 U.S.C. § 1332. In the Notice, NAACO avers that "[n]o defendant objects to the Removal of this civil action to the Eastern District of Pennsylvania." (Not. Removal ¶ 10.) The Notice does not include a signature or statement of consent by a representative of Industrial. The next day, January 17, 1997, Industrial's attorney filed an entry of appearance with this court.

On February 14, 1997, Plaintiffs filed this motion, arguing that the Notice of Removal is defective because all served defendants did not properly join in the removal. (Mem. Supp. Mot. Remand at 2.) On February 27, 1997, Industrial filed a responsive brief and a Statement of Consent with the court. On February 28, 1997, NAACO filed a responsive brief.

II. DISCUSSION

A. Removal Generally

Removal statutes are strictly construed and any doubts are to be resolved in favor of remand. Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990), cert. denied, 498 U.S. 1085 (1991). The removal statute provides that any defendant desiring to remove a civil action from state court to federal district court must file a notice of removal, signed pursuant to Federal Rule of Civil Procedure 11, within thirty days after receipt of a paper from which it may be ascertained that the case is

removable. 28 U.S.C. § 1446. The statute is silent as to whether, in a multi-defendant case, all defendants must join in the motion.

However, courts in the Third Circuit follow the "rule of unanimity" which requires all served defendants to join in or consent to a notice of removal within thirty days of service of the complaint in order to perfect removal. Ellerbee v. Union Zinc, Inc., 881 F. Supp. 162, 164 (E.D. Pa. 1995); Ogletree v. Barnes, 851 F. Supp. 184, 186 (E.D. Pa. 1994). All defendants need not sign the notice. However, there must be an entry in the court record to bind the allegedly consenting defendant. Ellerbee, 881 F. Supp. at 164. Therefore, the representation of consent by the defendant that filed the motion, alone, is insufficient to bind another defendant. There must be a clear and unambiguous written expression¹ of consent to removal by each served defendant. Ogletree, 851 F. Supp. at 187. Each consenting defendant must either sign the notice of removal, file its own notice of removal, or file a written consent or joinder to the original notice with the court. Id.

Furthermore, the indication of consent must be timely. While some courts have permitted non-signing parties to submit affidavits of consent after the thirty-day time limit, courts in

1. Courts in other jurisdictions have permitted oral consent, instead of written, which if made in open court, would constitute an entry on the record. Because Industrial made no such oral representations of consent to the court, the court will not address whether it is sufficient.

this circuit have not. The rule is mandatory and this court is without authority to expand it. Id.

B. Consent to Removal

Defendants argue that Industrial's consent was properly communicated to the court because its attorney filed an entry of appearance with the court on January 17, 1997, and filed a Statement of Consent on February 27, 1997. The court disagrees.

Plaintiffs commenced this action on December 17, 1996. Defendants were both served on that day. NAACO, on behalf of Yale, filed the Notice of Removal on January 16, 1997, thirty days later. In order to comply with the rule, Industrial was required to file a written expression of consent with the court on that same day. It concedes that it did not. (Industrial's Mem. Opp. Remand at 4-5.) Industrial's Statement of Consent was filed more than thirty days later and is untimely. Industrial's filing a notice of appearance with this court on January 17, 1997, is not a consent to removal--it merely shows that Industrial was aware that the action had been removed and attempted to comply with the rules of this court. See Ogletree, 851 F. Supp. at 189; see also Landman v. Borough of Bristol, 896 F. Supp. 406, 408 (E.D. Pa. 1994) (filing an answer within the thirty days was not sufficient because it was ambiguous as to consent).

C. Waiver

Industrial also argues that Plaintiffs waived their right to object to jurisdiction because they filed a certification in this

court that the action exceeded the federal arbitration limits. (Industrial's Mem. Opp. Remand at 7.) In support, it cites a case from another jurisdiction for the proposition that "affirmative conduct or unequivocal assent" constitute waiver. Id. (citing Maybruck v. Haim, 290 F. Supp. 721 (S.D.N.Y. 1968)). Even if the court were to employ this definition, Plaintiffs' conduct constitutes neither affirmative conduct nor unequivocal consent. Again, as with Industrial's conduct in this court, it merely shows awareness that the action was removed and an attempt to comply with the rules of this court. It does not amount to affirmative conduct as it relates to the removal or unequivocal consent thereto.

III. CONCLUSION

For the above reasons, the court will grant Plaintiffs' Motion to Remand. An appropriate order follows.

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YALE MATERIALS HANDLING	:	
CORPORATION AND INDUSTRIAL	:	
TRUCKS, INC.	:	NO. 97-383

ORDER

AND NOW, TO WIT, this ____ day of June, 1997, upon consideration of Plaintiffs William K. Southwick, Jr. and Jennifer Southwick's Motion to Remand and Defendants Yale Materials Handling Corporation and Industrial Trucks, Inc.'s opposition thereto, IT IS ORDERED that said motion is GRANTED and the case is REMANDED to the Court of Common Pleas of Philadelphia County.

The Clerk of Court is ordered to return the file to the court from which it was removed.

LOUIS C. BECHTLE, J.